

## *HIPAA Privacy Rule Accounting of Disclosures under the Health Information Technology for Economic and Clinical Health Act*

### Summary

The U.S. Department of Health and Human Services' (HHS) Office for Civil Rights published a Notice of Proposed Rulemaking (NPRM) that modifies the accounting of disclosures requirement under the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule.<sup>1</sup> The Health Information Technology and Clinical Health Act of 2009 (HITECH Act) requires the HHS to modify the HIPAA Privacy Rule to require covered entities and business associates to account for disclosures of protected health information (PHI) to carry out treatment, payment, and health care operations if such disclosures are through an electronic health record (EHR).<sup>2</sup> If enacted as proposed, the rule would require medical practices that maintain electronic patient information to have the capability to produce a detailed report of every instance a patient's information was accessed by any staff member for any reason. The HHS also proposes expanding the accounting provision to provide individuals with the right to receive an access report indicating who has accessed electronic PHI in a designated record set (DRS)<sup>3</sup> and making changes to the existing accounting requirements to improve their workability and effectiveness.<sup>3</sup>

The Privacy Rule currently requires covered entities to provide an individual upon request an accounting of certain disclosures of an individual's PHI for a period of six years prior to the request. While a disclosure includes the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the information, the Privacy Rule currently does not require covered entities to include in the accounting requirement disclosures for treatment, payment, and health care operations.<sup>5</sup> Covered entities, including business associates, are responsible for providing an individual with the accounting of disclosures.

### Proposed Privacy Rule Changes

The proposed modifications center on two rights for individuals – a right to an accounting of disclosure and a right to an access report. Revisions to the existing accounting of disclosures

requirements aim to provide individuals with information about disclosures that are most likely to impact their personal and legal interests, while taking into account the covered entities and business associates administrative burdens.<sup>4</sup>

### 1. Right to an Accounting of Disclosures

The HHS proposes to change the scope of information included in the disclosures to explicitly include business associates; change the accounting period from six years to three years; and list the types of disclosures that are subject to the accounting. Concerning public health disclosures, the HHS proposes to exempt from the accounting reports of child abuse or neglect to a public health authority or other appropriate government authority authorized by law to receive such reports.<sup>5</sup>

#### *a) Content of the Accounting*

The HHS proposes to maintain the elements required for an accounting of disclosures under the existing Privacy Rule<sup>6</sup> with minor modifications. The proposed modifications state that if the actual date of disclosure is not known, a covered entity or business associate need only provide an approximate date or period of time for each disclosure. The HHS also proposes that for multiple disclosures to the same person or entity for the same purpose, the approximate period of time is sufficient, and the date of disclosure may be descriptive. Additionally, the HHS proposes:

1. That the accounting must include a brief description of the PHI that was disclosed, the name of the entity or natural person who received the PHI and if known, their address;
2. To require that covered entities provide individuals the option of limiting the accounting to a particular time period, type of disclosure, or recipient; and
3. That the individual should not have to pay for an accounting report that covers a three-year period if the individual is trying to learn of disclosures that occurred over a limited time period.

<sup>1</sup> U.S. Department of Health and Human Services, Office for Civil Rights, *HIPAA Privacy Rule Accounting of Disclosures under the Health Information Technology for Economic and Clinical Health Act*, 45 CFR Part 164, RIN: 0991-AB62, May 31, 2011. Available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-05-31/pdf/2011-13297.pdf>. <sup>2</sup> The HITECH Act is a part of the American Recovery and Reinvestment Act of 2009, 45 CFR Part 164.

<sup>3</sup> A designated record set (DRS) can include more information than an EHR, such as medical and billing records and other records used by healthcare providers to make decisions about individuals. Jennifer Nelson Carney and Bryn Hunt, "Proposed Rule Modifies HIPAA's Accounting of Disclosures Requirements: A Health Care Bulletin," Bricker & Eckler, June 8, 2011. Available at: <http://www.bricker.com/publications-andresources/publications-and-resources-details.aspx?Publicationid=2184>.

<sup>3</sup> U.S. Department of Health and Human Services, Office for Civil Rights, "HIPAA Privacy Rule Accounting of Disclosures under the Health Information Technology for Economic and Clinical Health Act," 45 CFR Part 164, RIN: 0991-AB62, May 31, 2011. Available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-05-31/pdf/2011-13297.pdf>. <sup>5</sup> Jennifer Nelson Carney and Bryn Hunt, "Proposed Rule Modifies HIPAA's Accounting of Disclosures Requirements: A Health Care Bulletin," Bricker & Eckler, June 8, 2011. Available at: <http://www.bricker.com/publications-and-resources/publications-andresources-details.aspx?Publicationid=2184>.

<sup>4</sup> U.S. Department of Health and Human Services, Office for Civil Rights, *HIPAA Privacy Rule Accounting of Disclosures under the Health Information Technology for Economic and Clinical Health Act*, 45 CFR Part 164, RIN: 0991-AB62, May 31, 2011. Available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-05-31/pdf/2011-13297.pdf>.

<sup>5</sup> As permitted under § 164.512(b)(1)(ii).

<sup>6</sup> § 164.528(b)(2)

#### *b) Provisions of Accounting*

The HHS proposes three modifications to the existing requirements of accounting for disclosures:

1. Decrease the permissible response time from 60 days to 30 days;
2. Require that covered entities provide individuals with the accounting in the form and format requested by the individual if readily producible; and
3. Clarify that the covered entity may require the individual to submit the accounting request in writing.

#### *c) Documentation*

The HHS proposes two changes to the documentation requirements for the accounting of disclosures:

1. Due to the recommended reduction in the accounting period from six years to three years, it is no longer necessary to retain information that is solely being kept to provide an accounting of disclosures for more than three years.
2. The HHS is revising the regulatory language to clarify that a covered entity must retain a copy of the accounting provided to the individual, and not the original accounting document.

### **3. Right to an Access Report**

The HHS proposes to provide individuals with the right to receive an access report that indicates who has accessed their electronic DRS. This proposed right would implement the HITECH Act by providing individuals with information about disclosures through an EHR for treatment, payment and health care operations. The HHS proposes to expand this right to use of information and to all electronic PHI in an individual DRS.

#### *a) Content of the Access Report*

The HHS proposes that the access report include the following: the date of access; the time of access; the name of the individual, otherwise the name of the entity accessing the electronic DRS information; a description of what information was accessed, if available; and a description of the action by the user, if available, such as create, modify, access, or delete.

#### *b) Provision of the Access Report*

The HHS proposes that a covered entity would have 30 days to provide the access report, including the logs of business associates that create, receive, maintain or transmit electronic DRS information. The covered entity must provide the access report in a machine readable or electronic format requested by the individual, if readily producible, or

if not, in a human readable electronic form agreed to by the covered entity and individual.

The HHS proposes that the covered entity may not charge for providing the first access report to an individual in any 12-month period, but may charge a reasonable, cost-based amount for each additional access report requested within the 12-month period, and individuals will need to make a request for an access report in writing.

#### *c) Documentation*

The HHS proposes the same documentation requirements for access reports as for accountings of disclosures; the documentation must be maintained for three years, and the covered entity must retain copies of access reports that were provided to individuals for six years.

### **4. Accounting for Disclosures through an Electronic Health Information Exchange (HIE)**

The HHS concluded that at this time, accounting for disclosures of full accounting, including a description of the purpose of the disclosure when a covered entity or business associate transmits some or all of an EHR to another electronic system including an HIE in response to a query, would be overly burdensome when compared to the potential benefit to individuals. The HHS intends to revisit this issue and determine whether the accounting requirements should be revised to encompass such disclosures.

### **5. Patient Safety Work Product Confidentiality**

The HHS proposes that a covered entity shall exclude from an accounting or access report any information that meets the definition of patient safety work product<sup>7</sup> at 42 CFR 3.20.

### **6. Notice of Privacy Practices**

The HHS proposes to revise the notice of privacy practices (NPPs) to require a statement regarding an individual's right under the proposed rule to receive an access report. **Effective Date**

The HHS expects to publish these regulations by the end of 2011 or the beginning of 2012, with accounting of disclosures becoming effective sometime during the summer of 2012. Compliance for the right to receive an access report would become effective on January 1, 2013 for an electronic DRS (which includes but is not limited to EHRs) acquired by the provider after January 1, 2009 and on January 1, 2014 for an electronic DRS acquired by the provider either on or before January 1, 2009.

### **Covered Entities and Business Associates**

Covered entities and business associates will need to make the following changes at a minimum to comply with the proposed rule.<sup>8</sup>

<sup>7</sup> Definition for Patient Safety Work Product is available at: [http://cfr.regstoday.com/42cfr3.aspx#42\\_CFR\\_3p20](http://cfr.regstoday.com/42cfr3.aspx#42_CFR_3p20).

<sup>8</sup> John Mulhollan, "Proposed Rule Would Change HIPAA Accounting of Disclosures Covered Entities will Continue to Face Significant Technical Challenges," Baker Hostetler, June 13, 2011. Available at:

<http://www.dataprivacymonitor.com/hipaahitech/proposed-rule-would-change-hipaaaccounting-of-disclosures---covered-entities-will-continue-to-face/>.

1. Health care providers, health plans, and employers sponsoring health plans need to amend their business associate agreements to reflect and facilitate compliance with the new accounting and access reporting requirements.
2. Covered entities need to update the NPPs to inform individuals about the new accounting of disclosure and access report requirements, and to ensure the updated NPPs are provided to the patients within the required timeframes.
3. Covered entities and business associates need to update their accounting of disclosure policies and procedures to include technical and administrative changes to reports that log access, changes, uses and disclosure of electronic PHI, and the ways this accounting is provided to individuals requesting the accounting of disclosures and access report.

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